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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

CALUMET GRAIN and ELEVATOR COMPANY,
Appellant,
vs.
THE CITY OF CHICAGO, DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY,
Appellees.
No. 135.

DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY,
Appellants,
vs.
THE CITY OF CHICAGO,
Appellee.
No. 136.

Appeals from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Reply Brief on behalf of Appellants in said Cases.

S. A. LYNDE,
WARREN B. WILSON,
Counsel for Appellants.

BARNARD & MILLER PRINT, CHICAGO.

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It is contended for the appellee:

First. That the Circuit Court had no jurisdiction of the case.

Second. That the appeal from the decree of the Circuit Court should have been taken to the Court of Appeals.

Third. That the complainants in the two bills should have joined in one bill.

Fourth. That the act of March 3, 1899, should not

be construed as giving to the persons receiving the permit from the Secretary of War therein provided for affirmative authority to construct the structure described in such permit (in this case the dock in question), but only as giving the Secretary of War the defensive power by withholding such permit to prevent the erection of structures in the navigable waters that might obstruct interstate commerce.

Fifth. That if this act should be construed as giving the Secretary of War power to issue a permit granting on behalf of the United States affirmative authority to build a pier or dock along the shore of the navigable waters, that the act as so construed is unconstitutional as an unauthorized delegation of power to an executive officer.

Sixth. That even though complainants are entitled to build docks, this does not exclude the police powers of the state and city.

Seventh. That the injunction cannot issue in either case because that would be to authorize the building of a dock in front of the property of the complainant in that case, whereas the permit only allows one dock to be built in front of both tracts.

Eighth. That the right of appellants to build the dock in question depends upon the fact of their ownership of the submerged ground on which it is to be built, and that that ownership is not averred.

The two last of these suggestions are simply an erroneous reading of the bills. The argument in substance is this, that the Secretary of War has only issued a permit for the building of one dock, and that the bills do not show the ownership by the appellants, the grantees in said per-

mit, of the entire strip of submerged land upon which it is proposed to build this dock; that therefore an injunction cannot go in favor of the complainants in either bill because that would be to give authority to build only a part of the dock authorized to be constructed. This is manifestly a mere misreading of the bill. On page 13 of the bill (page 7 of the transcript of the record in case number 136), the bill filed by Cummings and Kennedy, it is alleged that the complainants therein are the owners of the entire strip except the south 300 feet of block 108, which was then and is now owned by the Calumet Grain and Elevator Company, and on which said company was also proposing to build the new dock. A similar averment in the same language, the names only being changed, appears in the transcript of the record of No. 135. The averment in both bills is quite distinct. (See page 7 of transcript of record in No. 136.) "That the portion of said block 108, which your orators now own, has a frontage upon said Calumet river of about 479 feet, and that your orators as the owners of said portion of said block 108, are also the owners of the land under the water of this stream up to the center line thereof, save and except as their title thereto may be affected by the deed of conveyance theretofore made by Columbus R. Cummings, from whom they derived their title to said premises from the United States, which is hereinafter more fully stated and referred to."

The averment in each bill is also that the entire strip is owned by the complainants in the two bills. Thus in 136, page 13 of record, page 6 of transcript, "which they proposed to build in conjunction with the building of a new dock along the south 300 feet of said block 108 which was then and is now owned by The Calumet Grain

and Elevator Company, and on which said company was also proposing to build a new dock."

Again, the right of a shore owner along a navigable stream to build docks to enable him to obtain access to the navigable portions of the stream, does not depend upon the technical ownership of the submerged soil. Even in cases where it has been held that the submerged soil belongs to the state, it has also been held that the right of the shore owner to build out to the navigable water still attaches.

Illinois Central R. R. Co. v. *Illinois,* 146 U. S., 387.

Wehr v. *Harbor Commissioners,* 18 Wall., 645.

But in Illinois it has been held repeatedly that the right of the owner of land bounded on a navigable stream is to the center of that stream.

City of Chicago v. *Van Ingen,* 152 Ill., 624.

It is not sought by the complainants in either case to enforce a supposed right to build a dock in front of their own property alone, except in connection with the dock proposed to be built by the complainants in the other case. The only remedy sought is an injunction against an interference by the city with the construction of a dock such as is authorized by the Secretary of War, and not against interference with the construction of only a part thereof.

Again, it is contended that one bill should have been brought by the complainants in both cases. The complainants in the one case are not joint owners of any property with the complainants in the other case. Their rights are entirely distinct. The same act works a sev-

eral injury to each, of which they cannot jointly complain. But if the court should be of opinion that all of the complainants are interested in the decree to be rendered, and that therefore all should be heard in the same suit, in No. 135, the bill of the Calumet Grain and Elevator Company, the complainants in No. 136, D. Mark Cummings and Grace Dunlap Kennedy are made defendants, and the regular allegation made that application had been made by the complainant to Cummings & Kennedy to join as co-complainants in the bill, and that it was refused. It is true that at the time when the defendant, the city, filed its demurrer, process had not yet been served upon these defendants, nor had they entered their appearance, but they are, nevertheless, parties. It is argued on behalf of the appellees that they are not parties until they have been brought into court by the service of process, and cases are cited holding that a final decree is not binding on parties who are not served. But to hold a party not served not to be bound by a final decree entered in his absence, is not at all the same thing as holding the bill defective for want of parties on the demurrer of another party because at the time of the filing of the demurrer process had not yet been served.

The Circuit Court had Jurisdiction.

The case is plainly one arising under the laws and constitution of the United States. It is argued that the Circuit Court was without jurisdiction on the authority of *Tennessee* v. *The Union Planters' Bank*, 152 U. S., 454, and similar cases, holding that the federal right must appear in the original declaration or bill or the jurisdiction of the Circuit Courts would not attach; that, if the federal question arises by the assertion of a defense or by

a replication of the plaintiff, that question can only be tested in the federal court on appeal from the Supreme Court of the state, if the Supreme Court of the state shall deny that right. The applicability of these cases is not apparent. If the federal question is presented anywhere in this record, it is in the bill. No other pleadings are filed except a demurrer. The rights asserted in the bill are plainly those derived under the constitution and laws of the United States. It is claimed by the appellants that the Acts of Congress of August 2, 1882, and July 5, 1884, together with the authorized action of the executive officers of the government thereunder, confer express authority upon these complainants to build this dock. It is also claimed by the appellant that the Act of March 3, 1899, and the permit issued thereunder by the Secretary of War, confer the express authority of the United States to build this dock, and the charge in each instance is that the right conferred by these several statutes is being lawlessly interfered with; that the city authorities are forcibly preventing the exercise of this license or permission issued by the United States, and an injunction is sought to prevent their interference with the doing of the things claimed to be so authorized by these Acts of Congress. The right is also asserted in the bill under the commerce clause of the constitution, in connection with these statutes, to do what is attempted to be prevented. If these contentions are well founded, it is hard to conceive of a plainer case of rights arising directly from the laws and the Constitution of the United States, than those asserted in the bills in these two cases.

> "That a case arises under the constitution of the United States, when the right of either party de-

pends upon the validity of an act of Congress, is clear."

Patton v. *Brady*, 184 U. S., 611.
Cohens v. *Virginia*, 6 Wheat., 264-379.

The validity of the Act of March 3, 1899, upon which the right asserted by the complainants in these bills is based is asserted by one party and denied by the other in the argument submitted. The right of the complainants depend upon the validity of that statute, as well as on the other acts cited.

"Where does Congress get the power to authorize the Secretary of War to give a private party leave to put a structure of no aid at all, or at least of only doubtful and purely private aid to interstate commerce in a local harbor and thus displace the police powers of the state expressly reserved to them and to the people?" (Appellee's Brief, p. 26.) But, even if the question of the validity of these statutes were not argued, or if there was no argument at all, if the question was actually involved, the jurisdiction arises.

Again, in the same case, it is said, quoting from a former ruling, that a case arises under the constitution and laws of the United States, when the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction. A construction of the Act of 1899, such as is contended for by the appellee, holding it to be only preventive legislation and not to grant direct authority to erect these structures, would not sustain the claim based thereon. The construction contended for by appellants, that it is an affirmative grant of authority, would sustain that claim.

Again, a construction of the Acts of August 2, 1882, and July 5, 1884, that they designed to give to the shore owners affirmative authority to construct docks up to the line defined in those statutes, and in the report of the Board of Engineers approved thereby, would sustain this claim. A construction that may mean something else would not sustain it.

THE APPEAL WAS PROPERLY TAKEN TO THIS COURT.

The jurisdiction of the Circuit Court does not rest upon diverse citizenship, but the case is one arising solely under the laws and constitution of the United States. In such a case the appeal lies only to this court.

> "If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive."
>
> *Huguley Mfg. Co.* v. *Calleton Cotton Mills*, 184 U. S., 290.

The provision is that appeals may be taken from the Circuit Courts direct to the Supreme Court.

> "In any case that involves the construction or application of the constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn into question."

This case involves the application of the commerce clause of the constitution of the United States and of the fourteenth amendment, and it is also a case in which the constitutionality of the Act of Congress of March 3, 1899, is drawn in question.

> "It was the intention of the Act defining the jurisdiction of the Circuit Court of Appeals, and of this

court, to distribute the appellate jurisdiction, and to limit an appeal to only one court."

The purpose was manifestly to confine constitutional questions to this court, leaving questions involving ordinary property rights to the courts of appeals. It has been held, in substance, that the right to pursue interstate commerce is a right derived from the commerce clause; that any action preventing the exercise of interstate commerce is in violation of the commerce clause. Thus, a tax levied upon a drummer for the privilege of carrying on interstate commerce, is held to violate the interstate commerce clause.

Stockard v. *Morgan,* 185 U. S., 27.

There are two classes of things that may be done, which are included in the term "commerce between the several states," as used in the commerce clause. First, the actual traffic; second, the construction of local aids to commerce. Both these things are held to be the thing called by the name of "commerce," which Congress is entitled to regulate, the difference between the two being that as to the first of these classes the commerce clause gives the right, or, if it does not create the right, it at least gives federal sanction to the right under all circumstances. As to the second clause, it authorizes or gives them the same sanction, not under all, but under some circumstances, which circumstances exist in this case. The right to this second class of commercial privileges is none the less granted by the constitution when the circumstances arise under which they are withdrawn from state control than in the first class under all circumstances.

In *Wiley* v. *Sinkler,* 179 U. S., 58, the case was an action against election officers of the State of South Caro-

lina for damages for refusing to allow the complainant to vote at an election for member of Congress. The case was taken directly to the Supreme Court. The court held:

> "This case involves the construction and application of the constitution of the United States and is therefore rightly brought directly from the Circuit Court of the United States to this court. The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state from which they are chosen, but has its foundation in the constitution of the United States. Cited and approved in *Stafford* v. *Templeton,* 185 U. S., 487.
>
> The right to build a dock authorized by an Act of Congress has its foundation in the commerce clause of the constitution of the United States.
>
> The case equally involves the construction and application of the constitution, whether the right sought to be enforced arises exclusively under the constitution or depends also on legislation and other circumstances, as in *Wiley* v. *Sickles, supra,* upon an act of the legislature of South Carolina. In all such cases the right has its ultimate foundation in the constitution."

In *Gibbons* v. *Ogden,* 9 Wheat., 1, it was held that the obstruction of the exercise of a license issued by the United States was in violation of the commerce clause. The question in this case is in all respects similar. If the contention of the appellants is sound, that the Act of March 3, 1899, properly construed, gives to the Secretary of War authority to issue a valid license, then the case is an exact duplicate of *Gibbons* v. *Ogden,* and *Gibbons* v. *Ogden* is certainly a case involving the application and construction of the constitution. The fact that the authority of *Gibbons* v. *Ogden* is not often disputed, and that the same question is not often discussed, does not make the case any the less one involving the application

and construction of the constitution of the United States than if the labors of the court of that day had been still unperformed, and the court, in applying the constitution, was not assisted by that opinion.

It is argued by counsel for apellee, that the action of the city which it is sought to restrain by the bills in these cases is in the exercise of a proper police power, and from which the city was not ousted by the jurisdiction taken by Congress over this river, but there are two conclusive answers to this argument:

1. That the identical thing which is attempted to be forbidden is expressly authorized by Act of Congress, and a conflict arising between the two, the local regulation must give way.

Henderson v. *Mayor of New York*, 92 U. S., 259.

As was said in *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How., 518, 566, "no state law can hinder or obstruct the free use of a license granted under an act of Congress."

2. This ordinance of the City of Chicago, upon which appellee relies, and under which it is acting in preventing the building of these docks, is unreasonable and void, and in violation of the commerce clause of the United States constitution, for the same reasons that the police regulations and ordinances were held void in the cases of

Chy Lung v. *Freeman et al.*, 92 U.S., 275;
Ry. Co. v. *Huson*, 95 U. S., 465;
Henderson v. *Mayor of New York et al.*, 92 U. S., 259;
Welton v. *Missouri*, 91 U. S., 275.

This ordinance is not an attempt on the part of the City of Chicago to properly regulate the

building of docks in the interest of public safety, but to give to the commissioner of the department of its public works an arbitrary power precisely analogous to that attempted to be given to the commissioner in the case of *Chy Lung* v. *Freeman, supra,* to forbid the doing of a thing which under these circumstances is the "commerce" which Congress is authorized to regulate.

The case is also properly brought directly to this court because the constitutionality of a law of the United States is directly drawn in question. It is insisted in the argument of appellee that the Act of March 3, 1899, construed, as we insist that it should be construed, has given the Secretary of War power to give affirmative authority for the erection of this dock, is unconstitutional. (See p. 26, Appellee's Brief.) It is quite apparent, therefore, that the constitutionality of a law of the United States is drawn in question by the very argument which has been submitted by counsel for appellee, and therefore the appeal is properly taken to this court.

As to the construction of the Act of March 3, 1899, and the power of the Secretary of War derived therefrom to issue an affirmative permit, and as to the validity and constitutionality of that statute as so construed, the views of appellant are fully presented in the original brief, and no argument on these questions is offered in support of the suggestion of a different construction, and on the claim that the statute therein construed is invalid, and unconstitutional, we refer for our views on these questions to the original brief.

It is also asserted by counsel for appellee that there is an adequate remedy at law, and that for that reason a court of equity should not take jurisdiction of this case; but no argument has been submitted by counsel in sup-

port of this contention, and it is so clearly without merit that we content ourselves simply to refer to the case of *Yates* v. *Milwaukee,* 10 Wall., 497.

The prevention of irreparable injury even by wrongdoers who are about to commit trespasses for which an action of damages does not afford an adequate remedy, is a recognized head of equity jurisdiction.

In re Debs, 158 U. S., 564.

It is also suggested that the proposed dock extensions lie wholly west of the channel line of the river and that Section 10 of the Act of March 3, 1899, only applies where wharves are to be built "outside established harbor lines, or where no harbor lines have been established."

This suggestion is plainly not in point. The place where this dock is to be established is not in the harbor at all. The harbor as alleged is at the mouth of the river. (Rec., 7; Trans., 3.) This dock is to be built in the river above the harbor.

The Acts of Congress of August 2, 1882, and July 5, 1884, established the line in the river to which docks might be built. The Act of March 3, 1899, provided for federal control of the character of all structures to be built in the navigable rivers, thus occupying the entire field both of the location and character of the structures to be erected. Section 11 of the Act of March 3, 1899, provides for establishing harbor lines in harbors, but this dock lies not only outside harbor lines, if any are established, but outside the harbor and in a navigable river.

It is respectfully submitted that appellants have been granted affirmative permission, under constitutional legislation by Congress, under the commerce clause of the constitution, to erect the dock proposed to be built in ac-

cordance with the plans and specifications approved by the chief engineer and by the Secretary of War, and that neither the State of Illinois nor the City of Chicago, nor any other authority has any right to obstruct or clog with burdens the exercise of this license, granted by the United States.

The decree of the Circuit Court should be reversed.

Respectfully submitted.

S. A. LYNDE,
WARREN B. WILSON,
Counsel for Appellants.